86-333

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JIM BARBER, DAVID TARTER, and RAYMOND BRADLEY,
Petitioners,

vs.

AMERICAN AIRLINES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff in an ADEA reduction-in-force case need only demonstrate as part of his prima facie case that the employer favored younger employees, or whether the plaintiff is required to demonstrate that the favored employees were outside the protected age group.

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VS.

AMERICAN AIRLINES, INC.,
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On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The judgment of the district court entered on the jury verdict, dated December 31, 1984, and the Memorandum Opinion and Order of the district court, dated March 18, 1985, are set out in the Appendix hereto at pages A-1 and A-5. The opinion of the United States Court of Appeals for the Eighth Circuit, reversing the decision of the district court, entered on May 28, 1986, and the supplemental decision denying the petitioners' petition for rehearing en banc, are also set out in the appendix at pages A-8 and A-14. The opinion of the United States Court of Appeals for the Eighth Circuit has recently been reported as *Barber v. American Airlines, Inc.*, 791 F.2d 658 (8th Cir. 1986).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). On May 28, 1986, the United States Court of Appeals for the Eighth Circuit entered an order reversing the judgment of the district court on a jury verdict for all three plaintiffs. On June 10, 1986, plaintiffs petitioned for rehearing, which petition was denied on July 3, 1986, without a supplemental opinion.

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §§621, *et. seq.*, provides, in pertinent part:

> Section 4 [29 U.S.C. §623] (a) It shall be unlawful for an employer...(1) to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.
>
> Section 12, 29 U.S.C. §631(a) provides:
>
> The prohibitions in this Act shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

STATEMENT OF THE CASE

Petitioners Barber, Bradley, and Tarter were employed for several years as operations agents (in the operations function) at the American Airlines, Inc., facility in Little Rock, Arkansas. The operations agents were responsible for aircraft load and control functions. In early January, 1983, all three petitioners received notification that they were being "surplused" due to a reduction-in-force. The reduction encompassed a phasing-out of operations functions in twenty-one (21) cities in the Southern Region (including Little Rock) and a consolidation of those functions at the Dallas-Ft. Worth (DFW) facility.

Petitioners were presented with four options they could choose from in preparation for the reduction-in-force, including early retirement, lay-off with recall rights, and transfer to DFW. Two of the petitioners, Barber and Bradley, who were ages fifty-one (51) and fifty-eight (58), respectively, ultimately elected early retirement. Tarter, aged forty-nine (49), was not eligible for early retirement under company regulations and he ultimately elected to transfer to the Reservations function at the DFW facility.

Before they were terminated, petitioners repeatedly requested that company officials give them the opportunity, available to employees under company regulations and past practice, to displace or "bump" less senior full-time ticket agents in the Little Rock facility. These requests prompted American Airlines to offer petitioners part-time ticket agent positions in Little Rock. However, petitioners were never permitted to displace any full-time employees or to utilize the "shift-splitting" mechanism (combining two part-time positions into a full-time position) in order to remain employed at the Little Rock facility. Barber and Bradley were terminated by March, 1983, and petitioner Tarter was transferred to the DFW facility. At the time of the reduction-in-force, the three petitioners had accumulated a total of eighty-five (85) years seniority, and eighteen weeks of annual vacation benefits, and were receiving the maximum salaries for operations agents employed by American. As of March, 1983, three full-time agents remained in the Little Rock facility ranging in age from forty-five (45) to forty-eight (48) and eight part-time agents were retained, the majority of them in their twenties.

On June 27, 1983, petitioners filed their complaint for age discrimination under the Age Discrimination in Employment Act (ADEA) in the Eastern District of Arkansas, Western Division.

The Court exercised jurisdiction over the case pursuant to 28 U.S.C. §1343(a)(4) and 29 U.S.C. §621, *et. seq.* Trial was com-

menced to a jury on October 15, 1984, the Honorable Garnett Thomas Eisele presiding. The jury rendered verdicts in favor of all three petitioners and the district court entered judgment on the jury verdicts on December 31, 1984. On March 18, 1985, the district court filed a Memorandum and Order denying the respondent's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial. A-5.

The respondent appealed on April 15, 1985, to the United States Court of Appeals for the Eighth Circuit. On May 28, 1986, the Court reversed the judgment for petitioners, holding that there was insufficient evidence to create a jury issue of age discrimination. On June 10, 1986, petitioners filed a petition for rehearing, which was denied on July 3, 1986, without supplemental opinion. A-14.

In discussing the petitioners' evidence regarding age discrimination, the Court of Appeals stated that petitioners' theory that evidence of a similar reduction-in-force situation in 1981 at the Little Rock facility, when older employees had been allowed to invoke company regulations to displace younger employees, contained the "seeds of its own refutation" because the employees in the 1981 incident who were allegedly "favored" "were also within the protected age group.[1] The Court of Appeals also stated that the petitioners' evidence of age discrimination was not convincing because those ticket agents whom petitioners wished to displace during the 1983

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[1] The evidence of the 1981 reduction-in-force and the "bumping" incident which followed it was presented by petitioners for two purposes: First, to prove the "qualification" prong of the *prima facie* case; second, to demonstrate that, on at least one occasion, American Airlines had interpreted its regulations in a non-discriminatory manner, by allowing the older, more senior employees at the Little Rock station to train so that they could "bump" younger employees to other locations, and remain in Little Rock after the reduction-in-force. In their Petition for Rehearing, petitioners argued that the Eighth Circuit panel misconstrued this evidence.

reduction-in-force were "in the same general age bracket" as petitioners and "not a single one of them was outside the protected age group."

ARGUMENT

This Court should grant petitioners' petition for certiorari and review the decision by the Eighth Circuit for two reasons: (a) the Eighth Circuit Court of Appeals has rendered a decision which directly conflicts with decisions on the same issue by the Fifth, Sixth, and District of Columbia Circuits; and (b) there is a discernable split in the circuits regarding the nature of proof required to make a prima facie ADEA case in a reduction-in-force context, an important issue regarding the interpretation of the ADEA, which should be resolved by this Court. While the Eighth Circuit, in reversing the district court's judgment on the jury verdict, held that there was insufficient evidence in the record to create a jury question of age discrimination, the actual cornerstone of the Court's decision was the legal premise that in a reduction-in-force context the plaintiff must demonstrate that the employer favored employees who were *outside the protected age group* (under age 40) to raise the inference of age discrimination.[2]

The Eighth Circuit's position directly conflicts with decisions by four circuits which have expressly defined the elements necessary to prove a prima facie ADEA case in a reduction-in-force context. *Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981); *Thornbrough v. Columbus & Greenville R. Co.*, 760 F.2d 633 (5th Cir. 1985); *LaGrant v. Gulf & Western Mfg. Co., Inc.*, 748 F.2d 1087 (6th Cir. 1984); *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339 (D.C. Cir. 1983);

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[2] The crucial passage from the opinion of the Eighth Circuit is the following:

> But again, no inference of age discrimination can rationally be drawn, because the employees whom American chose to retain in Little Rock...were also in the same general age bracket as plaintiffs. Not a single one of them was outside the protected age group... Pet. App.

Maxfield v. Sinclair International, 766 F.2d 788 (3rd Cir. 1985).[3]

In *Williams, supra,* the Fifth Circuit modified and refined the guidelines established by this Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), with regard to proof of age discrimination in reduction-in-force cases.[4] *Williams* holds that employees may establish a prima facie case by adducing circumstantial evidence that younger employees were more favorably treated than older employees. That test has been repeatedly refined and affirmed by more recent Fifth Circuit decisions, including *Thornbrough, supra,* where the Fifth Circuit succinctly stated:

> In a reduction-in-force case, what creates the presumption of discrimination is not the discharge itself, but rather the discharge coupled with the retention of younger employees.

760 F.2d at 644.

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[3] In non-reduction-in-force cases, the First and Eleventh Circuits have taken the position that the ADEA prima facie case turns on a comparison with *younger* employees. *See, Loeb v. Textron, Inc.,* 600 F.2d 1003 (1st Cir. 1979); and *Goldstein v. Manhattan Industries, Inc.,* 758 F.2d 1435 (11th Cir. 1985), and the First Circuit's decision in *Loeb* was cited by this Court with approval in *TransWorld Airlines v. Thurston,* ____ U.S. ____, ____, 105 S.Ct. 613, 621, 83 L.Ed.2d 523 (1985).

[4] The plaintiff in an ADEA under *McDonnell Douglas* and *Burdine* has the initial burden of adducing evidence that creates an "inference that an employment decision was based on a discriminatory criterion illegal under the Act." *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977) (construing Title VII, 42 U.S.C. §2000e, *et. seq.*). Since in a reduction-in-force context the presumption of age discrimination is not raised by the mere termination of older employees, the focus is on the younger employees who are retained.

That conclusion is fully consistent with the approach taken by the District of Columbia Circuit in *Coburn,*[5] *supra,* where the Court held that in a reduction-in-force suit, an employee can establish a prima facie case merely by proving that, while he was fired from a job for which he was qualified, "*Younger* persons were retained and others later promoted." 711 F.2d at 343. (Emphasis supplied).

The Sixth Circuit in *LaGrant, supra,* utilized this same formulation of the elements of the prima facie ADEA case in company-wide reorganization cases and cited the Fifth Circuit's decision in *Williams* with approval. *LaGrant* held that an ADEA prima facie case requires proof, either direct, circumstantial, or statistical, that age was a determining factor in the plaintiffs' termination. 748 F.2d at 1091; *Williams, supra,* at 129. The analysis in *LaGrant* makes it quite clear that such proof involves a comparison of treatment with all younger employees, not only those outside the protected age group.

The Fifth Circuit decision of *McCorstin v. United States Steep Corp.,* 621 F.2d 749, 754 (5th Cir. 1980), articulates the rationale for the rule adopted by that circuit:

> [B]ecause the discrimination involves age, rather than sex or race, a requirement that the replacement be from a non-protected group fails to take the reality of the working place into account. Because of the value of experience, rarely are sixty-year olds replaced by those under forty. The replacement process is more subtle but just as injurious to the worker who has been discharged...

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[5] The *Coburn* court stated that an inference of discrimination is created if the plaintiff shows that he (1) belongs to the statutorily-protected age group (40-70), (2) was qualified for the position, (3) was terminated, and (4) was disadvantaged in favor of a *younger* person. *See, Cuddy v. Carmen,* 694 F.2d 853, 857 (D.C. Cir. 1982).

Similarly, the Third Circuit, in *Maxfield,*[6] *supra,* stated:

> If no intra-age group protection were provided by the ADEA, it would be of virtually no use to persons at the upper ages of the protected class whose jobs require experience since even an employee with clear anti-age animus would rarely replace them with someone under 40.

766 F.2d at 792.

Contrary to the rationale supporting the decisions of these circuits, the decision of the Eighth Circuit exacts a comparison with employees who are under the age of forty, a standard which is inconsistent with the legislative purpose of the ADEA, and the purpose of this Court's *McDonnell Douglas* test as it was later refined by *Furnco Const. Corp. v. Waters,* 438 U.S. 567 (1978); *Board of Trustees v. Sweeney,* 439 U.S. 24 (1978); and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 249 (1981). Although the Eighth Circuit does not hold as such, the opinion in the instant case is based on this legal position. Twice in its opinion, the Eighth Circuit notes that its conclusion of insufficient evidence depends on petitioners' failure to present their case as a comparison between employees inside and outside the protected age group.

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[6] In *Maxfield,* the Third Circuit clarified language in two earlier decisions, *Massarsky v. General Motors Corp.,* 706 F.2d 111 (3rd Cir.), *cert. denied,* ____ U.S. ____, 104 S.Ct. 348 (1983), and *Duffy v. Wheeling Pittsburgh Steel Corp.,* 738 F.2d 1393, 1395 (3rd Cir.), *cert. denied,* ____ U.S. ____, 105 S.Ct. 592 (1984), that a plaintiff "need show only that he is a member of the protected class and that he was laid off from a job for which he was qualified while others not in the protected class were treated more favorably." The Court stated that in both cases the "favored" employees were under 40, but in both, the Court emphasized elsewhere that a prima facie case could be made by showing replacement by a younger employee. *Massarsky,* 706 F.2d at 118 n.13; *Duffy,* 738 F.2d at 1395, n.2.

The decision of the Eighth Circuit is arguably supported by decisions of the Fourth Circuit in *EEOC v. Western Electric Co.*, 713 F.2d 1011 (4th Cir. 1983), and the Seventh Circuit in *Trembath v. St. Regis Paper Co.*, 753 F.2d 603 (7th Cir. 1985) (non-reduction-in-force), and *Tice v. Lampert Yards, Inc.*, 761 F.2d 1210 (7th Cir. 1985) (reduction-in-force).[7] In *Western Electric*, the Fourth Circuit concluded that the district court had erred as a matter of law in failing to require the plaintiff EEOC to prove in its prima facie case that there was favored treatment of "persons outside the protected age class," or other evidence that age was not treated neutrally by the employer. 713 F.2d at 1015.

Thus, there is a real and substantial conflict in the circuits with regard to the proof required of a plaintiff in an ADEA reduction-in-force case. The federal question is significant and involves an interpretation of the federal statute which must be resolved now by this Court. *Shapiro v. United States*, 235 U.S. 412 (1914).

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[7] This decision also contravenes two earlier Eighth Circuit decisions under the ADEA, *Tribble v. Westinghouse Elec. Corp.*, 669 F.2d 1193 (8th Cir. 1982), *cert. denied*, 460 U.S. 1080 (1983); and *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958 (8th Cir. 1978). Both cases held that proof that younger persons were favored by the employer met the fourth prong of the *McDonnell Douglas* test, although neither case involved a reduction-in-force.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to the Eighth Circuit Court of Appeals should be granted. The Eighth Circuit's decision is in conflict with decisions in at least four circuits, and a genuine split in the circuits exists on a significant federal issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Philip E. Kaplan, hereby certify that a copy of the above and foregoing document has been mailed on this 21st day of August, 1986, to:

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Philip E. Kaplan

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-83-552

Jim Barber, Raymond Bradley, and David Tarter
Plaintiffs

v.

American Airlines, Inc.
Defendant

JUDGMENT

Filed Dec. 31, 1984

On October 18, 1984, the jury returned verdicts as follows: in favor of Jim Barber on his complaint of age discrimination, assessing his actual damages at $45,000; in favor of Raymond Bradley on his complaint of age discrimination, assessing his actual damages at $45,000; and in favor of David Tarter on his complaint of age discrimination.

Issues involving liquidated damages were submitted to the jury, with respect to plaintiffs Barber and Bradley. No issue on liquidated damages was submitted to the jury with respect to plaintiff Tarter, inasmuch as he was not, and is not, entitled to back pay. As to Mr. Barber and Mr. Bradley, the jury refused to award liquidated damages or to find that American's conduct was willful. Accordingly, the plaintiffs' claims for liquidated damages are dismissed with prejudice.

Based upon the jury verdict, the Court concludes that Jim Barber and Raymond Bradley are entitled to the injunctive relief of reinstatement as employees of American Airlines and are to be hired as full-time ticket agents at the American Airlines' Lit-

tle Rock station. Mr. David Tarter is entitled to injunctive relief requiring defendant to place and assign him as a full-time ticket agent at the American Airlines' Little Rock station. Upon reinstatement, plaintiffs Barber and Bradley will be entitled to all the rights, privileges and benefits of other similarly positioned full-time employees, with those rights, privileges and benefits restored as if they had never "retired"; and plaintiff Tarter shall be entitled to placement as a full-time ticket agent in Little Rock with full and consistent rights and privileges.

The Court agrees with defendant that the retirement benefits that plaintiffs Barber and Bradley have received must be returned to the defendant. Accordingly, Mr. Bradley, who was paid a lump sum distribution upon retirement, must return that sum, without interest, to the American Airlines' retirement program, less the amount by which that distribution was reduced by federal income taxes paid on it by Mr. Bradley. Mr. Bradley must then seek immediate refund of those taxes paid and upon receipt of that refund, pay it to the American Airlines retirement program, which will result in a return by Mr. Bradley of the total lump sum retirement distribution that he received. Such sums, when repaid, will be credited to Mr. Bradley's American Airlines retirement program. As to Mr. Barber, he must return to the American Airlines retirement program the total of the monthly retirement benefits that he has received from that program. Accordingly, the actual damages of $45,000 awarded by the jury to Mr. Barber will be reduced by that sum, which repayment will then be credited to Mr. Barber's American Airlines retirement program.

The Court also agrees with defendant's contention that the amounts earned by Mr. Bradley since his "retirement," to wit: the sum of $2,007, must be deducted from the jury award in his favor. The Court will itself deduct this sum from the $45,000 jury award in the judgment granted below.

The Court agrees with plaintiff Tarter that the defendant is not entitled to the reimbursement of any portion of the $12,500

bonus or moving allowance which was paid to Mr. Tarter upon his move to Texas.

Finally, the Court concludes that an award of a reasonable attorney's fee to the plaintiffs as prevailing parties is proper, and reserves the right to rule on the specific amount thereof at a later date if the parties are not able to reach an agreement thereon.

It is therefore Ordered that the plaintiff, Mr. Jim Barber, have judgment against the defendant in the amount of $45,000.

It is further Ordered that the plaintiff, Mr. Raymond Bradley, have judgment against the defendant in the amount of $42,993.

It is further Ordered that the defendant reinstate the plaintiffs, Mr. Jim Barber and Mr. Raymond Bradley, as its employees and that they be assigned positions as full-time ticket agents at defendant's Little Rock station, possessing all the rights, privileges and benefits of similarly-situated full-time employees, with those rights, privileges and benefits restored as if they had never been "retired."

It is further Ordered that the plaintiffs, Mr. Barber and Mr. Bradley, are entitled to pay, in the amounts they would have received had they not been "retired," from and after the date of the jury's verdict herein until the date they are actually reinstated pursuant hereto.

It is further Ordered that the defendant place the plaintiff, Mr. David Tarter, in a position as full-time ticket agent at its Little Rock station with all of the rights and privileges pertaining to such position.

It is further Ordered that the plaintiffs, Mr. Barber and Mr. Bradley, reimburse defendant for the retirement payments they have received in accordance with this order and judgment.

It is further Ordered that plaintiffs have their costs expended.

It is further Ordered that the case be, and it is hereby, dismissed.

Dated this 31st day of December, 1984.

/s/ Garnett Thomas Eisele
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-83-552

Jim Barber, Raymond Bradley and David Tarter
Plaintiffs

v.

American Airlines, Inc.
Defendant

MEMORANDUM AND ORDER

Filed March 18, 1985

Pending before the Court are five motions filed pursuant to the entry of judgment on December 31, 1984. In this Order, the Court will address each of the motions.

On January 7, 1985, defendant filed a "Motion for Judgment Notwithstanding the Verdict and in The Alternative Motion for New Trial." The Court has examined these two motions carefully and concludes that they must be denied. The grounds for the motions are generally that the evidence was insufficient to support the jury's verdict and that the Court erred in its rulings on questions of law, particularly in relation to many of the jury instructions. The Court, after reviewing the record, concludes that the evidence was sufficient to support the verdict and that the instructions given were proper.

Turning to the defendant's "Motion to Amend Judgment," the Court first expresses the view that most of the issues raised amount to little more than carping and could easily have been worked out among the parties in view of the language of the judgment entered on December 31, 1984. The defendant states

that the judgment should be amended to reduce Mr. Barber's recovery by $8,750.07, the amount of retirement benefits he has received. The Court's judgment stated that Mr. Barber and Mr. Bradley would have to return the retirement benefits. It states:

> As to Mr. Barber, he must return to the American Airlines retirement program the total of the monthly retirement benefits that he has received from that program. Accordingly, the actual damages of $45,000 awarded by the jury to Mr. Barber will be reduced by that sum, which repayment will then be credited to Mr. Barber's American Airlines retirement program.

Therefore, according to the judgment, the defendant must pay $8,750.07 to Mr. Barber's retirement program and, when it evidences that it has done so, it may reduce the actual damages to be paid to Mr. Barber by said sum.

The Court will not condition Mr. Bradley's reinstatement upon his returning all of the retirement benefits he has received, but the Court is directing Mr. Bradley to make arrangements which will insure that the retirement benefits paid to him are returned to the defendant, without interest, no later than 30 days after receipt by Mr. Bradley of the amount of $42,993 awarded to him in the original judgment. The Court denies all other requests for relief included in defendant's motion to amend judgment.

Finally, the Court will take up plaintiff David Tartar's motion for further relief pursuant to F.R.C.P. 62(c).

In the judgment entered herein on December 31, 1984, it was ordered that:

> the defendant place the plaintiff, Mr. David Tartar, in a position as full-time ticket agent at its Little Rock Station with all of the rights and privileges pertaining to such position.

On January 15, 1985, defendant filed a supersedeas bond to stay the payment of certain backpay awards to the other plaintiffs and the payment of certain costs. The bond does not in any way stay the injunctive relief granted in the December 31, 1984 judgment. The Court is this day approving the supersedeas bond upon that understanding.

The Court has considered the plaintiffs' motion for further relief and the defendant's response and the plaintiff's reply thereto, from all of which it concludes there is no stay of the Court's order in favor of Mr. Tartar and that the defendant should therefore comply with the Court's judgment of December 31, 1984, no later than April 10, 1985.

Dated this 18th day of March, 1985.

/s/ Garnett Thomas Eisele
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1507

Jim Barber, David Tarter, and Raymond Bradley,
Appellees,

v.

American Airlines, Inc.,
Appellant.

On Appeal from the United States District Court
for the Eastern District of Arkansas.

Submitted: November 11, 1985

Filed: May 28, 1986

Before ARNOLD and WOLLMAN, Circuit Judges, and REGAN,* Senior District Judge.

ARNOLD, Circuit Judge.

This is an action under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§621 et seq. The jury returned a verdict for all three plaintiffs. From the judgment entered on

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* The Hon. John K. Regan, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

this verdict, the defendant appeals. We hold that there was insufficient evidence to make a jury question of age discrimination and therefore reverse.

We state the facts in the light most favorable to plaintiffs, who won the verdict. On January 5, 1983, the defendant, American Airlines, Inc., notified the three plaintiffs, Jim Barber, David G. Tarter, and Raymond Bradley, that it had decided to transfer some of its operations from Little Rock to the Dallas-Fort Worth Airport. This change, which defendant characterized as a consolidation of "operations" functions for its southern region, meant that the jobs plaintiffs had been performing, or at any rate a substantial portion of the duties of those jobs, would no longer exist in Little Rock. Barber, who was 51 at the time, and Bradley, who was 58, were given a choice between taking early retirement and moving to Dallas, where they would be given jobs equal in pay and benefits to their Little Rock positions. Tarter, who was only 49, was not eligible for early retirement, and he was told simply that he would have to move to Dallas if he wished to continue full-time employment with the defendant. Faced with this choice, Barber and Bradley took early retirement, and Tarter moved to Dallas, where, at least as of the time of the trial, he still worked for American. All three plaintiffs then brought this action, claiming that their employer's decision to confront them with the choice described was based at least in part on their age, and was therefore a violation of the ADEA, which provides, in general, that employers may not discriminate against employees between the ages of 40 and 70 on account of age.

As the case was put to the jury by the District Court - and neither party now complains of any error in the jury instructions - plaintiffs' contentions were summarized as follows. In their view, they should have been permitted to "bump" other, less senior employees who were working on the ticket counter in Little Rock, instead of being forced either to retire early or go to Dallas. American's reply to this claim is simply that under its

personnel practices in effect at the time, no employee could exercise his "bumping" rights under the seniority system unless he was qualified to perform the job into which he wished to "bump," or could become qualified within five days. In American's view, the three plaintiffs were not sufficiently proficient in the computerized business of issuing tickets to justify allowing them to displace full-time ticket agents already on the job. Plaintiffs say that they were sufficently qualified, and that American refused to allow them to "bump" because of their age. In the alternative, plaintiffs claim that they could have become sufficiently qualified, through study or on-the-job training, if they had been given more advance notice of American's plan to consolidate functions at the Dallas-Fort Worth Airport. When plaintiffs got notice of the planned consolidation on January 5, 1983, they were given only three days to make up their minds whether to retire or move to Dallas. Other employees in the past, plaintiffs argued, had been given more time to prepare for such a situation and had been permitted to educate themselves sufficiently to "bump" ticket agents even though they were no more qualified to perform ticket-agent functions than plaintiffs.

In this appeal from a jury verdict, we are concerned primarily with the simple question whether the record contains enough evidence to justify a rational jury in finding that age was a determining factor in what happened to plaintiffs, a factor in the absence of which the employer would not have taken the adverse action it did. See *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 714-15 (1983); *Gilkerson v. Toastmaster, Inc.,* 770 F.2d 133, 135 (8th Cir. 1985). The three-stage order of proof and the presumptions described in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) (claim of racial discrimination under Title VII), an analytical scheme which is applied also in age-discrimination cases, is useful to the court in structuring the proof while the trial is in progress, and, in cases tried to the court without a jury, as a framework against which the court can view the evidence in making its findings.

But once a finding of discrimination *vel non* has been made, and the resulting judgment is being evaluated on appeal, these presumptions fade away, and the appellate court should simply study the record with a view to determining whether the evidence is sufficient to support whatever finding was made at trial. This is the teaching of *Aikens, supra.*

Here, plaintiffs are members of the protected age group, and the employer did take adverse action against them. The employer's asserted reason for not permitting them to "bump" is that they were not qualified to do so under its personnel regulations. To this plaintiffs reply that these regulations have not been uniformly applied, and that other employees no more skilled than they were permitted to remain in Little Rock in the past in a similar situation. In general, if the employer's asserted nondiscriminatory reason for taking the action of which a plaintiff complains can be shown not to be the true reason, or not to have been consistently applied in the past, an inference of discrimination can rationally be drawn by the trier of fact. See, *e.g., Dace v. ACF Industries, Inc.,* 722 F.2d 374, 378-79 (8th Cir. 1983), *modified per curiam,* 728 F.2d 976 (8th Cir. 1984). But here, plaintiffs' theory - that others were permitted to "bump" in the past in a similar situation - contains the seeds of its own refutation. For the other employees who were allegedly given the privilege that plaintiffs now claim were also within the protected age group and, in fact, were reasonably close in age to the plaintiffs themselves.[1] In these unusual circumstances, an inference of age discrimination is plainly impermissible. For even if plaintiffs were unfairly treated, and even if others were unjustly favored in the past, no inference of age discrimination can be drawn, for the simple reason that the employees who were allegedly given preferential treatment were not "young." They were in the same age group as plaintiffs. If any kind of discrimination is operating here, therefore, it is not age discrimination, and that is all this case is about.

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[1] The ages of the allegedly favored employees ranged from 46 to 54.

Similarly, we can accept plaintiffs' position that the evidence was sufficient to persuade a rational jury that they in fact were qualified to "bump" in 1983, and that, under American's personnel regulations, they ought to have been allowed to do so. But again, no inference of age discrimination can rationally be drawn, because the employees whom American chose to retain in Little Rock, the ticket agents whom plaintiffs wished to "bump," were also in the same general age bracket as plaintiffs.[2] Not a single one of them was outside the protected age group, and Jim Hicks, the person who would have been "bumped" first, was 48 years old, almost the same age as the plaintiff Tarter. The three ticket agents who were permitted to remain in Little Rock, to be sure, had somewhat less seniority with the company than the plaintiffs (combined seniority of 57 years as opposed to plaintiffs' combined seniority of 84 years), and seniority may in some circumstances be a proxy for age for purposes of evaluating age discrimination. Here, however, that reasoning will not work, because, as already noted, the employees whom plaintiffs wished to displace were substantially the same age as plaintiffs themselves.

In reviewing a judgment entered on the verdict of a jury, we are mindful that we must view the evidence in the light most favorable to the party winning the verdict, here plaintiffs, according them the benefit of every reasonable inference that can be drawn from the evidence, and setting aside the verdict only if the evidence points all one way. *Dace, supra,* 722 F.2d at 375-76. We have carefully read every page of the testimony at this trial, and we are persuaded that this stringent standard has been met. The jury could rationally have believed that plaintiffs ought in good conscience to have been permitted to stay in Little Rock, and that American had violated its own personnel practices in demanding their transfer, but there is absolutely no

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[2] The ages of these employees ranged from 45 to 48.

substantial evidence in this record that would justify attributing American's actions to plaintiffs' age.

We have considered *Thornbrough v. Columbus & Greenville R.R.*, 760 F.2d 633 (5th Cir. 1985), stressed by plaintiffs' counsel at the oral argument. In our opinion, the case does not stand for any proposition helpful to plaintiffs' position here. It states, for example, that "[i]n a reduction-in-force case, what creates the presumption of discrimination [created when plaintiff has made a prima facie case] is not the discharge itself but rather the discharge coupled with the retention of younger employees." *Id.* at 644. It is exactly this latter element -favoritism towards younger employees - that is missing here. See also *Bell v. Gas Serv. Co.*, 778 F.2d 512 (8th Cir. 1985); *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1163 (8th Cir. 1985) (judgment on jury verdict reversed in reduction-in-force situation even though plaintiff's position was "combined . . . with that of a younger man"). We add, in fairness to the District Court, that *Bell* and *Holley* were both decided after this cause was tried.

The judgment is reversed, and the cause remanded with directions to dismiss the complaint with prejudice.

A true copy.

Attest:

Clerk, U.S. Court Of Appeals, Eighth Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1507-EA

Jim Barber, et al.,
Appellees,

v.

American Airlines, Inc.,
Appellant.

Appeal from the United States District Court
for the Eastern District of Arkansas

Appellees' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

July 3, 1986